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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-682

SANTA CLARA PUEBLO, et al, *Petitioners,*

v.

JULIA MARTINEZ, et al, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Federal District Court for the District of New Mexico is reported as *Martinez* v. *Santa Clara Pueblo,* 402 F. Supp. 5 (D.N.M. 1975) and is reproduced in the Appendix to the Petition for Writ of Certiorari, pp. 1(a)-27(a). The opinion of the 10th Circuit Court of Appeals, 540 F.2d. 1039 (10th Cir. 1976) is reproduced as pp. 28(a)-45(a) Appendix to the Petition.

JURISDICTION

The Judgment of the 10th Circuit of Appeals was entered on August 16, 1976.

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Indian Civil Rights Act, 25 U.S.C. §§ 1301-3 (1968) § 1301. Definitions.

For purposes of this subchapter, the term—

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "Powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and

(3) "Indian court" means any Indian tribal court or court of Indian offense. (Pub. L. 90-284, title II, § 201, Apr. 11, 1968, 82 Stat. 77):

§ 1302. Constitutional Rights.

No Indian tribe in exercising powers of self-government shall—

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

§ 1303. Habeas Corpus.

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe. (Pub. L. 90-284, title II, § 203, Apr. 11, 1968, 82 Stat. 78).

The 1939 Ordinance

December 15, 1939

Be it ordained by the Council of the Pueblo of Santa Clara, New Mexico, in regular meeting duly assembled, that hereafter the following rules shall govern the admission to membership to the Santa Clara Pueblo.

1. All children born of marriages between members of the Santa Clara Pueblo shall be members of the Santa Clara Pueblo.
2. That children born of marriages between male members of the Santa Clara Pueblo and non-members shall be members of the Santa Clara Pueblo.
3. Children born of marriages between female members of the Santa Clara Pueblo and non-members shall not be members of the Santa Clara Pueblo.
4. Persons shall not be naturalized as members of the Santa Clara Pueblo under any circumstances.

The Constitution and By-Laws of Santa Clara Pueblo are reproduced in the Appendix.

QUESTIONS PRESENTED

1. Does the Indian Civil Rights Act, 25 U.S.C. §§ 1301-3 (1968) waive the sovereign immunity of Indian tribes from suit in federal courts and thus confer

jurisdiction upon federal courts in matters of tribal membership?

2. Assuming that the Act vests federal courts with jurisdiction to resolve Indian tribal membership disputes, what legal standard of equal protection should be applied to a tribal membership question?

STATEMENT OF THE CASE

Proceedings Below:

The case involves application of Section 1302(8) of the Indian Civil Rights Act to the Santa Clara Pueblo Tribal Membership Ordinance of 1939. Plaintiffs allege that the Ordinance is discriminatory and violates said Section of the Act. Suit was filed on September 22, 1972, in the Federal District Court for the District of New Mexico. The Defendants raised the defenses of lack of jurisdiction, sovereign immunity, failure to exhaust tribal remedies and others. All motions to dismiss were denied by the District Court. Trial to the Court without a jury was held November 25 through 27, 1974 and Judgment for the Defendants was entered on June 25, 1975. The Courts findings and conclusions are contained in its memorandum opinion (pp. 1(a)-27(a)) Appendix to the Petition for Writ of Certiorari, hereinafter referred to as App. to Pet. Notice of appeal was filed by Plaintiffs on July 17, 1975. The 10th Circuit Court of Appeals reversed the trial court and remanded the case for further action on August 16, 1976.

Facts:

Santa Clara Pueblo is a Pueblo Indian Tribe organized pursuant to a constitution under authority of

25 U.S.C. § 476. It covers roughly 48,000 acres which are held by the United States in trust for the Pueblo. Approximately 1200 recognized members and between 150-200 non-members currently live on the Pueblo. Some 150 recognized members live elsewhere, one-third of them in other locations in New Mexico and the rest scattered across twenty-two different States. App. to Pet. p. 14(a). At the time of the trial there were 34 mixed marriages out of a population of approximately 1200. R.p. 141.

Santa Clara Pueblo has been situated on the banks of the Rio Grande at its present location at least three hundred years. R.pp. 234-235. "Since 1680 the Pueblo has existed as a conquered people, identifiable as a group but surrounded by an alien culture, first Spanish and later American". App. to Pet. p. 19(a).

During the 1800's there was a great drop in population in Santa Clara Pueblo because of small-pox and other epidemics which were introduced into the Pueblo area by the Spaniards. The Pueblo people had no resistance to this kind of disease and as a result the population of Santa Clara Pueblo at that time dropped to approximately one hundred people. R.p. 236.

The Pueblo is an Indian tribe with sovereign powers of self-government over its territories and its people. Initially Santa Clara culture made no distinction between what Anglo-Americans would term "political" and "religious" matters. However, with the Spanish invasion in the early 1700 Century, the Pueblo instituted a "secular" government to distract Spanish attention from the *caciques* (religious leaders) who were the real authorities in the Pueblo. The distinction between religious and secular spheres is now well estab-

lished in the Santa Clara culture. App. to Pet. p. 14(a). The District Court found that:

"The membership of the Pueblo is and has been organized into what the anthropologists refer to as "moieties". Specifically the Winter people and the Summer people. Each moiety is lead by a *cacique,* and each is further divided into factions. The precise function and significance of moiety membership is not clear on the record; it is, however, clear that it is primarily a religious grouping. The *caciques* are still the dominant authorities in the Pueblo, nominating the candidates for secular office and exercising an effective veto by influence over the action of the secular government.

The division of the moieties into factions is a relatively recent development. During the early part of the twentieth century sharp conflicts developed in the Pueblo over the importance of traditional customs and values in the life of the Pueblo. For example, a major source of controversy was whether the Governor should be an older, highly respected man who was well versed in the traditional ways, or a younger man, educated in Anglo-American schools, who could speak English and would be able to deal more effectively with non-Pueblo society. The disagreement literally split the Pueblo, and during the late 1920s and early 1930s the Pueblo had two governors, neither of whom recognized the authority of the other, and two separate Winter and Summer moities. The Bureau of Indian Affairs (B.I.A.) staff in Washington offered to arbitrate the dispute. The entire Pueblo agreed that the BIA officials from Washington were irrelevant.

They did agree to have the resident BIA agent, Elizabeth Sargeht, help settle the difference. At her

suggestion, and after much discussion, the Pueblo organized pursuant to the authority of the Wheeler-Howard Act, 25 U.S.C. § 476, and adopted a Constitution and By-Laws in 1935." App. to Pet. pp. 14(a)-15(a).

Santa Clara Pueblo is a Tewa pueblo. Any people who speak the Tewa language are referred to as Tewa Pueblos by anthropologists. Other Tewa pueblos are San Juan, San Ildefonso, Tesuque, Pojoaque and Nambe. There were other Tewa pueblos but many died out during the pueblo rebellion in the late 1600s. R.p. 233. Santa Clara Pueblo is a theocracy, or government by religious group, R.p. 241, and patrilineal. "Patrilineal refers either to inheritance through the father's side as in our own society, which we would call patrilineal, and/or the inheritance of other matters or the following in other matters of the father's side." R.p. 243.

The Governor is the chief executive of the Pueblo charged with enforcing the law civil and criminal, written or unwritten *Santa Clara Constitution,* Art. V; *Santa Clara By-Laws,* Art. 1, Sec. 1. In addition the Governor appears to have the initial responsibility for settling controversies among and concerning the members of the Pueblo. A person aggrieved by a ruling of the Governor may appeal to the Council, at which time the Governor may vote only to break a tie. *Santa Clara Constitution,* Art. IV, Sec. 2.

All other secular governmental power and responsibility is vested in the Council, including the power to enact ordinances governing Pueblo life, *Santa Clara Constitution,* Art. IV. Sec. 1(5). Most important for the present case, the Constitution specifically grants

the Council the power to determine which children of mixed marriages shall be recognized as members of the Pueblo, Art. II. Sec. 1(c). and to determine who is a member for purposes of dealings in land and land use rights, Art. VII, Sec. 1. The 1939 Ordinance was enacted by the Council pursuant to these powers; and is agreed by all parties to be in force at this time. App. to Pet. p. 16(a).

Plaintiff, Julia Martinez, is a member of the Pueblo, as were both of her parents. Her husband, Myles Martinez, is a Navajo Inian, R.p. 346. The Martinez' have lived at Santa Clara Pueblo since 1941 with the exception of a period when Mr. Martinez was in the military service. The Martinez' have raised ten children on the Pueblo, eight of whom are living. Plaintiff, Audrey Martinez, is the eldest daughter of the Martinez'. All of the Martinez children speak and understand Tewa, the traditional language of the Pueblo. The children were raised at the Pueblo and made it their home except for periods away at school. App. to Pet. p. 17(a). These children are presently barred from Pueblo membership by the Ordinance of 1939. They can, however, be enrolled in the Navajo Nation if they desire. R.p. 22.

The Martinez children now live on land belonging to their mother, which she is prohibited from conveying to any person who is not a member. Contrary to the position taken by Plaintiffs it is not at all clear that the Martinez children face expulsion from Santa Clara Pueblo in the event that their mother should predecease them. R.p. 112. The Pueblo holds all of the land within the Pueblo's boundaries in fee simple title in common. Individual members, however, are granted

possessory interest in tracts of land which they may pass on to their descendants. The devolution of the possessory interests does not diminish the Pueblo's superior proprietary right. App. to Pet. p. 31(a). Nonmembers are not allowed to vote in Pueblo elections and they are not allowed to hold office as secular officials of Santa Clara Pueblo. App. to Pet. p. 17(a).

The lack of tribal membership does not in any way affect the Martinez' entitlement to participate in federal benefits accorded Indians generally. App. to Pet. p. 18(a). All the Martinez children are entitled to full benefits from the Bureau of Indian Affairs regardless of their lack of membership in the Santa Clara Pueblo. Plaintiff, Audrey Martinez, who was twenty-seven years old at the time of trial, has attended college for six or eight semesters on federal grants. R.p. 82-85. The children all have census numbers and are receiving complete medical and educational benefits. R.pp. 25, 61-63. The Martinez children have all the material rights that full members of the Santa Clara Pueblo have, except the right to vote or own land. R.p. 64. Even Mr. Martinez, a Navajo, has privileges that members have, such as irrigation water, farming, wood-hauling, fishing and hunting, R.P. 15.

Santa Clara Pueblo has consistently taken the position that the 1939 Ordinance is simply a written embodiment of a preexisting unwritten rule of membership that has been in existence from time immemorial. R.p. 109, 153, 208 and further that the Ordinance is essential to the cultural and religious heritage that is vital to the Tribe's existence. R.p. 117.

Mrs. Julia Martinez was fully aware of the consequences if she married a non-Santa Clara male. R.p.

63. She was told by her uncle that if she married a non-member of Santa Clara Pueblo her children could not be enrolled. Several other witnesses testified that they had been told of the consequence of marriage by a Santa Clara woman to a non-Santa Clara male by the tribal elders. R.pp. 108, 155, 179, 207. There was no testimony to the contrary.

There is no actual membership roll as such. R.p. 111. Julia Martinez has attempted to enroll her children in the Pueblo since 1946. The district court found that the Martinez' exhausted all remedies within the tribal system.

The record fails to show that the Pueblo has varied from the Ordinance under attack, there having been no exceptions to the Ordinance since its enactment. The district court ruled that "the 1939 Ordinance does not violate the restrictions of 25 U.S.C. §§ 1302(8) and Plaintiffs have not been denied the equal protection of the laws within the meaning of the Indian Civil Rights Act". App. to Pet. p. 25(a).

The district court's Memorandum Opinion was filed June 25, 1975. On July 17, 1975, the Plaintiffs filed their Notice of Appeal to the 10th Circuit and on August 16, 1976, the 10th Circuit of Appeals entered judgment reversing the lower court and remanding the case for further proceedings.

SUMMARY OF ARGUMENT

The Federal courts do not have jurisdiction of this case which involves the legality of the 1939 Tribal Membership Ordinance of the Santa Clara Pueblo. Santa Clara Pueblo is immune from suit in Federal

courts. This immunity is based on the sovereignty of Indian tribes and has long been recognized by the judicial branch. Through Congress has plenary power over Indian tribes and can waive sovereign immunity it has not done so.

The Indian Civil Rights Act does not give Federal courts jurisdiction over Indian tribes. The legislative history of the Indian Civil Rights Act makes it clear that Congress did not intend to waive tribal sovereign immunity. It was the intent of Congress that Federal courts have jurisdiction only over habeas corpus matters to protect the civil rights of Indian criminal defendants.

Assuming that the Federal courts have jurisdiction over this case, the strict equal protection standards of the Fourteenth Amendment to the United States Constitution are not applicable to this question of tribal membership.

If a Fourteenth Amendment standard is applied at all, it should be a rational relation test and not the compelling interest test applied by the Tenth Circuit.

The record of the district court proceedings show clearly that the very existence of the Tribe as an independent entity is dependent upon the validity of the Tribal membership ordinance. This objective passes scrutiny under either the compelling interest or rational-relation tests and as long as the tribal membership ordinance is applied in the even-handed non-discriminatory manner which it has been, it should be upheld.

The issue of tribal membership is closely analogous to that of naturalization of citizens by the United

States. The United States has absolute discretion, through Congress, to determine requirements for naturalization. Indian tribes have the same absolute discretion to determine requirements for enrollment in the tribe. The Courts should therefore apply the same standards to Indian membership questions that they apply to naturalization cases. This test is a very limited scope of judicial inquiry with the courts zealously avoiding substituting their political judgment for that of the tribes.

ARGUMENT

The Indian Civil Rights Act Does Not Waive The Sovereign Immunity Of Indian Tribes To Suit In Federal Courts And Does Not Confer Jurisdiction Upon Federal Courts In Matters Of Tribal Membership.

Santa Clara Pueblo is immune from suit in federal courts absent express congressional action authorizing jurisdiction. The United States Constitution treats Indian tribes on the same level as states and foreign nations. Art. I, Sec. 8. Cl. 3.

Indian tribes, such as Santa Clara Pueblo, which are recognized by the Federal Government are exempt from suit in Federal courts without express congressional authorization. *United States* v. *United States Fidelity Company,* 309 U.S. 506, (1940); *Twin Cities Chippewa Tribal Council v. The Minnesota Chippewa Tribe,* 370 F.2d 529 (8th Cir. 1967). Furthermore, statutory authority required to subject a tribe to jurisdiction of the federal courts must be "expressed in plain and unambiguous terms", *Thebo* v. *Choctaw Tribe of Indians,* 66 F. 372 (8th Cir. 1895); *Native American Church, etc.,* v. *Navajo Tribal Council,* 272 F.2d 131 (10th Cir. 1959).

The Indian Civil Rights Act contains no language indicating that it "expressly" waives the sovereign immunity of tribes, nor does it specifically grant jurisdiction in federal courts for actions against Indian tribes. The principal that waiver of sovereign immunity must be founded upon express language and cannot be based upon implication has been reaffirmed in recent cases. *United States* v. *King,* 395 U.S. 1 (1969); *Hamilton* v. *Nakai,* 453 F.2d 152 (9th Cir. 1972).

Though Congress has never expressly waived sovereign immunity of Indian tribes from suits in federal courts by conferring jurisdiction upon the courts to determine tribal membership questions, the 10th Circuit Court of Appeals ignored this issue. In holding that 28 U.S.C. § 1343(4) provides the requisite jurisdictional basis the Court ruled contrary to prior holdings of this Court. *United States* v. *United States Fidelity Co.,* supra; *Roff* v. *Burney,* 168 U.S. 218 (1897); *Lone Wolf* v. *Hitchcock,* 187 U.S. 553, (1903).

This Court teaches in *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164 (1973), that statutes concerning Indians must be read against a backdrop of the Doctrine of Tribal Sovereignty. "It must always be remembered that the various Indian tribes were once independent and sovereign nations and that their claim to sovereignty long predates that of our own Government." at 172. The Court in *McClanahan* quoted from *United States* v. *Kagama,* 118 U.S. 375, 381-382 (1886)—"they (Indian tribes) were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as Nations, not as possessed of the full attributes of sovereignty, but as a separate people, *with the power of regulating their internal and social rela-*

tions, and thus far not brought under the laws of the Union or of the State within whose limits they resided." (emphasis added). See also *United States* v. *Mazurie,* 419 U.S. 544, 557 (1975).

The most basic and fundamental sovereign right of any Indian tribe is its complete and absolute authority to determine all questions of its own membership as a political entity. The power of an Indian tribe to determine with total authority, all questions of its own membership including the power to revoke rights of membership which it has granted has been recognized by the Supreme Court. *Roff* v. *Burney,* supra; *Martinez* v. *Southern Ute Tribe of the Southern Ute Reservations,* 249 F.2d 915 (10th Cir. 1957). The trial court recognizing the importance to the tribe of having the authority to decide its membership stated; "Membership policies present the same interests on a different level. They are no more or less than a mechanism of social, and to an extent psychological and cultural, self-definition. The importance of this to Santa Clara or to any other Indian tribe cannot be overstressed. In deciding who is and who is not a member, the Pueblo decides what it is that makes its members unique, what distinguishes a Santa Clara Indian from everyone else in the United States. If its ability to do this is limited or restricted by an external authority, then a new definition of what it is to be a Santa Claran is imposed and the culture of Santa Clara is inevitably changed." App. to Pet. p. 20(a).

Federal courts have never been granted express jurisdiction by Congress to consider tribal membership questions. Accordingly, the Supreme Court held in *Lone Wolf* v. *Hitchcock,* supra, at P. 172. "Plenary

authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."

It is clear that prior to the passage of the Indian Civil Rights Act, federal courts did not have jurisdiction over Tribal enrollment matters. *Martinez* v. *Ute Tribe,* supra. Felix S. Cohen in Cohen, *Handbook of Federal Indian Law,* p. 133, (1942) stated:

> "The Courts have consistently recognized that in the absence of express legislation by Congress to the contrary, an Indian tribe has complete authority to determine all questions of its own membership. . . .
>
> The power of an Indian tribe to determine questions of its own membership derives from the character of an Indian tribe as a distinct political entity."

In dealing with a fundamental sovereign right such as membership of a tribe, Congress should speak with a loud and clear voice. This Congress has failed to do.

The Legislative History of the Act

The legislative history shows no indication that Congress intended to waive sovereign immunity of Indian tribes from suit in federal courts. Congress in order to protect civil rights of members of Indian tribes decided to strengthen tribal governments and tribal institutions. Testimony before the Ervin Committee indicated that Indian tribes lacked certain civil rights protections, many tribes not having constitutions or other formal governments.

Section § 1303 of the Act is the only section which vests jurisdiction in the federal courts, and it is limited to testing the legality of detention by tribal authority. After rejecting earlier drafts of the Act which would have provided de novo review of all criminal actions of tribal courts, Congress nevertheless felt that deprivation of personal liberty was of sufficient importance to require the carving out of an additional page of jurisdiction in federal courts. But even here, Congress did not waive sovereign immunity of Indian tribes from suit in federal courts because habeas corpus proceedings are actions directed only at officials who have custody of defendants, and not tribes per se. This section does not authorize actions against Indian tribes themselves but provides only a mechanism to prevent illegal detention of criminal defendants.

The legislative history of the Act supports Petitioners' position. In none of the hearings held upon the Act from 1961 through 1965 was there one word intimating that the Act would waive tribal sovereign immunity, or would vest the federal courts with jurisdiction over questions of tribal membership.

Frank J. Berry, Solicitor of the Department of the Interior during hearings prior to passage of the Act recognized that:

> "On the other hand, the people of Indian tribes have their roots in an entirely different culture and it may be that the devices which appropriately protected the interests of the Anglo-American of the late 18th Century may not be appropriate to protect the Indian tribal member of the middle 20th Century. *Hearings on S. 961-68 and S.J. Res. 40 to Protect the Constitutional Rights of American Indians before the Subcommittee on Constitutional rights of the Senate Committee on the Judiciary, 89th Cong., 1st Sess.* (1965) p. 17."

Senator Ervin himself expressed Congress' concern for protecting Indian self-government and cultural values stating:

> "The essential problem that confronts the Congress in this field is whether or not it is possible to establish a relationship with our other levels of government for the reservation Indians in a way that will harmonize with our levels of government and yet at the same time preserve for them such necessary local self-government as would seem to best serve their interest. *Hearings on S.J. Res. before the Sub-committee on Constitutional Rights of the Senate Committee on the Judiciary, 87th Cong., 1st Sess., Part 1* (1961) p. 19."

Congress did not intend that 25 U.S.C. § 1302 allow invasion by the federal courts into the areas of the essential political structure of Indian tribes. The Act incorporates only selected portions from the federal bill of rights contained in the first ten amendments, and subsection (8) contains an edited version of the language of the 14th Amendment. Nowhere are privileges and immunities of citizens mentioned, nor is any mention made in the Act of the right to vote.

Since determination of membership is an essential political attribute of an Indian tribe, 25 U.S.C. § 1302 should not be construed as having taken that right from the Indian tribes by implication and to have conferred it sub-silentio upon the federal courts.

It should be noted that S. 962, the earlier version of 25 U.S.C. § 1303, vested the federal district courts with jurisdiction to hear appeals from criminal convictions

in tribal courts de novo by a judge and a jury. These provisions were removed however and federal courts were vested with only limited jurisdiction over habeas corpus proceedings. Senator Ervin himself recognized this limited effect of the Act:

> SENATOR ERVIN: This bill does not provide for the Federal courts to review all the decisions of the Indian courts. In fact, provision for Federal review was in there originally, and at the request of a number of tribes we eliminated that entirely. *The only provision in this bill that provides for Federal court interference is writ of habeas corpus,* and that probably exists as law now, although I am not quite certain. If the man was convicted in violation of a law, the Federal court would have the jurisdiction to issue a writ of habeas corpus. *Hearing on Title II of the Civil Rights Act of 1968 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1st Sess.* (1969) p. 15 (Emphasis supplied).

The doctrine of sovereign immunity of Indian tribes is of such long standing and so well known that Congress must have been aware of it. Yet Congress refrained from any declaration, express or implicit, waiving immunity for purposes of the Act. When the entire Act is viewed against a backdrop of tribal sovereignty, it becomes clear that Congress chose to proceed in a deliberate manner by encouraging tribal self-determination and at the same time preserving the civil rights of tribal members. Congress acted knowing full well that it retained plenary jurisdiction over Indian tribes and that if tribal courts and tribal councils failed to protect the civil rights of tribal members, the Congress could take the more drastic step of vesting the federal courts with additional jurisdiction.

Until Congress takes such additional steps, it is wholly unwarranted for the federal courts to conclude that Congress has inferentially waived tribal sovereign immunity. It is especially dangerous to the continued existence of tribal governments for federal courts to attempt to read 25 U.S.C. § 1302 in conjunction with 28 U.S.C. § 1343(4) in such manner as to open a Pandora's box of litigation against Indian tribal governments. Yet this is exactly what the 10th Circuit Court of Appeals has done.

Most Indian tribes are able to continue functioning as sovereign units of government only by conserving their assets and obtaining federal grants for improving and enlarging their governmental functions. Their traditional sovereign immunity from suit in federal courts has protected them from vexatious suits which would literally destroy them. The Court of Appeals' decision striking down tribal sovereign immunity must be reversed in light of the apparent intent of Congress in enacting the Indian Civil Rights Act. In keeping with the rule that tribal sovereign immunity is not likely to be considered abrogated, this legislative history, especially Senator Ervin's statement of his understanding that 25 U.S.C. § 1303 is the only provision in the Act "that provides for federal court interference," appears to be conclusive of Congressional intent.

The 10th Circuit in *Slattery* v. *Arapahoe Tribal Council,* 453 F.2d 278 (10th Cir. 1971), held that the Indian Civil Rights Act was concerned primarily with tribal administration of justice, and the imposition of tribal penalties and forfeitures, and not with the specifics of tribal structure of office holding. Again the 10th Circuit in *McCurdy* v. *Steel,* 353 F. Supp. 629 (D-Utah

1973), rev'd, 506 F.2d 654 (10th Cir. 1974) stated that "Its (the ICRA) guarantees of individual rights should, where possible, be harmonized with tribal cultural and governmental autonomy." p. 633. Nor are the same restraints contained in the equal protection clause of the United States Constitution to be imposed on Indian tribes, *Groundhog* v. *Keeler*, 442 F.2d 674 (10th Cir. 1971).

The courts below have borrowed jurisdictional authority from other Statutes predating the Indian Civil Rights Act and have further borrowed legal doctrines from civil rights cases to authorize unlimited and wholly inappropriate relief. Those Federal courts that have addressed the problem of sovereign immunity of Indian tribes at all have overcome this obstacle by concluding that the Act by implication, sub-silentio abrogates tribal sovereign immunity and that without expressly saying so Congress has conferred jurisdiction for such actions. *Loncassion* v. *Leekity*, 334 F. Supp. 370 (D.N.M. 1971); *Johnson* v. *Lower Elwha Tribal Community*, 484 F.2d 200 (9th Cir. 1973).

As indicated the Act contains no specific provision giving Federal courts general jurisdiction over alleged violations of the Act. The only jurisdictional provision, 25 U.S.C. § 1303 provides jurisdiction "in a court of the United States, to test the legality of his detention by order of an Indian tribe". The Court of Appeals concern that if general jurisdiction were not read into the Act "it would constitute a mere unenforceable declaration of principles", App. to Pet. p 33(a), is not valid as all the provisions of the Act would still have full force and effect in Habeas Corpus cases, and could presumably be raised in any action by the tribes against individuals.

The Court of Appeals in the case at bar recognized that "the Congressional hearings give little attention to Constitutional rights other than protection under the criminal law and procedure of individuals in the tribal courts." The court further recognized that before enactment the Act was amended and provisions requiring restraints on blood requirements for membership were rejected as were first amendment, non-establishment clause provisions which would endanger the continued existence of Pueblo theocracies. App. to Pet. p. 37(a). The Appellate Court acknowledged that the deletion of the non-establishment clause in the 15th Amendment appears to have been in deference to the traditional Indian culture.

If sovereign immunity is to be taken from the tribes it must be taken by the legislative and not the judicial branch of government. Indeed, the case relied on by the Tenth Circuit Court of Appeals, *Dry Creek Lodge, Inc.* v. *United States*, 515 F.2d 926 (10th Cir. 1975), is clearly distinguishable. *Dry Creek* involved Indian land and the United States as a defendant and thus would have been properly brought in the federal court pursuant to 28 U.S.C. § 1331(a). *Moses* v. *Kennear*, 490 F.2d 21 (9th Cir. 1973). *Dry Creek* is of no assistance in teaching how the Act expressly waives the sovereign immunity of the tribe. The sovereign immunity of Indian tribes from suit in federal court cannot and has not been destroyed by implication. Titles 28 U.S.C. §§ 1331 and §§ 1343(4) are wholly insufficient to sustain jurisdiction against Indian tribes under the Indian Civil Rights Act.

All of the lower court opinions to date have glossed over Tribal sovereignty summarily and have held that

Congress has silently and by implication overruled an entire line of cases beginning with *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832).

The Equal Protection Clause Of The Indian Civil Rights Act Does Not Incorporate The Standards Of The Equal Protection Clause Of The 14th Amendment And The 14th Amendment Standards Are Not Applicable To Tribal Membership Questions.

Assuming arguendo that federal courts have jurisdiction over matters involving tribal membership, then we must ask what legal standard is to be applied and what meaning is to be given to the equal protection language in the Indian Civil Rights Act. The following language expresses petitioners' feelings as to the proper approach to this question.

> "So long as the courts continue to operate on the belief that they have jurisdiction to review all facets of Indian tribal government under the Indian Civil Rights Act, it will be necessary for federal judges to develop an understanding of the unique factors which characterize the life of Indian political communities. In the observation of this writer, the most important issues in the mind of Indian people today are tribal autonomy and Indian separatism. The two are intertwined. Often the issue is phrased in terms of "tribal sovereignty:" . . . Courts should be cognizant of: . . . (7) The Tribes' inherent right to determine their own membership must be understood as vital to the survival of these people, and the broadest recognition must be given the tribes' determination. . . . Above all, courts must avoid the unconscious tendency to bring missionary zeal to the task of extending the blessings of our philosophy of individual liberties to Indian tribes and tribal members. *Ziontz, In Defense of Tribal Sovereignty*—20, South Dakota, L.R. 1, 47-48 (1975).

Beginning with *Worcestor* v. *Georgia*, supra, federal courts have adopted a federal judicial doctrine exempting tribal governments from any constitutional restraint in the exercise of power over tribal members. Indian tribes have been recognized as "dependent sovereign nations" with certain attributes of sovereignty which include the power of regulating their internal and social relations. Neither the "Bill of Rights" nor the Fourteenth Amendment are applicable to Indian tribes. *Talton* v. *Mayes*, 163 U.S. 376 (1896); *Native American Church* v. *Navajo Tribal Council*, supra.

In analyzing the Civil Rights Act courts have uniformly held that the equal protection clause of the Act is not subject to the same standard as the Constitutional guarantee of equal protection. *Groundhog* v. *Keeler*, supra; *Lohnes* v. *Cloud*, 366 F.Supp. 619 (D.N.D. 1973); *Yellow Bird* v. *Oglala Sioux Tribe of South Dakota*, 380 F.Supp. 438 (D.S.D. 1974).

The Court of Appeals in this case recognized that in an evaluation such as the present one, "the cultural autonomy and integrity of the tribes were entitled to be weighed. . . . At the same time nothing resembling a formula for determining which of these conflicting interests is to prevail has been furnished." App. to Pet. p. 39(a). The court went on to state that the scope, extent and importance of the tribal interest is to be taken into account and that the individual right to fair treatment under the law was likewise to be weighed against the tribal interest.

The Court of Appeals apparently recognized the fact that Congress did not intend to subject a tribe to those requirements which are exacted under the equal protection clauses of the Fourteenth and Fifteenth

Amendments to the Constitution of the United States. The court while stating that "The Fourteenth Amendment standards do not, however, apply with full force" Id. page 42(a), did not enunciate clear principles or guidelines stating what test is to be applied in cases of this type.

Judge Doyle went on to say "But we must still ask: Is the Tribe justified in deviating from the Fourteenth Amendment standard on the basis that tribal, cultural and ethnic survival would suffer from full-scale enforcement of subsection (8) to these facts? We must hold that the facts do not support the decision that the tribe's interest is *compelling.*" (Emphasis added.) The court after stating that the 14th Amendment standards do not apply, proceeds to apply strict compelling interest standards. The court then discusses the matter under the strictest of 14th Amendments standards and not something with less than "full force".

The court discounted the tribes cultural interests and indicated that the ordinance was the product of "economics and pragmatics". Id. p. 44(a). Indeed the court gave little or no consideration to the historical problems encountered by the Pueblo in dealing with the outside world that gave rise to the tribal membership law which was codified in the 1939 Ordinance. *Equal Protection Under the Indian Civil Rights Act: Martinez* v. *Santa Clara Pueblo,* 90 Harv. L. Rev. 627 (1977). The court ignored the record and the testimony as to the social makeup of the tribe as being patrilineal, patrilocal and patricultural by referring to the Lower Court's findings as "conclusory characterizations". Apparently the court did not consider the testimony of the only expert witness, Dr. Florence Hawley Ellis,

R.pp. 227-333, see also *The Pueblo Social Organization as Basis for Rules of Tribal Membership,* App. (k) p. 22(a)-62(a) Brief of Amici Curiae, the Pueblo De Cochiti, et al.

In *Daly* v. *United States,* 483 F.2d 700 (8th Cir. 1973), the court considered an ordinance requiring that half the members of a tribal council be of at least one half blood. This distinction is clearly more invidious than the alleged discrimination in this case as racial classifications are suspect and subject to strict scrutiny, *Loving* v. *Virginia,* 388 U.S. 1 (1967). The court in *Daly,* went on to uphold the blood quantum requirement which required one-quarter blood or more, for enrollment as a tribal member, but one-half blood or more for eligibility to be Chairman of the Council. This had been challenged as a denial of Equal Protection. The court stated:

> In the instant case, we also are convinced that the Tribe has sufficient cultural interest in setting a higher blood quantum requirement to hold office than for mere membership in the Tribe if it so desires. However, once the requirements are established, they must be applied uniformly to avoid violating 25 U.S.C. § 1302(8), pp. 705 & 706.

It appears that the uncertainty as to the proper standard to be applied under the equal protection provision of the Indian Civil Rights Act has been of concern to all the circuits. It is equally apparent that the circuits that have considered the problem are in general agreement that the necessity of preserving tribal culture and self-government requires the application of a different test than that applied under the Fourteenth Amendment. The 8th Circuit asked whether the allegedly discriminatory action was "founded in tribal

custom or governmental purpose which would justify modification of traditional equal protection concepts "*Means* v. *Wilson,* 522 F.2d 833 (8th Cir. 1975). The Ninth Circuit in *Howlett* v. *The Salish and Kootenai Tribes,* 529 F.2d 233, 238 (9th Cir. 1976) asked whether "strict application of traditional equal protection doctrines would significantly impair a tribal practice or alter a custom fairly imbedded in Indian culture."

While the courts have been unable to agree as to the proper standard, it is clear that the standard should be considerably less stringent than standard Fourteenth Amendment standards. However, Judge Doyle held the Pueblo to a higher standard than that applied by this Court to cases involving discrimination based on gender.

This Court has articulated several possible tests. The first of these, and the one that would apply under normal Fourteenth Amendment standards, is the "rational relation test". Where this standard applies it is required merely that there exist a rational relation between the classification and a legitimate state end. If, however, the Court finds a classification to be "suspect" then the state is required to demonstrate a "compelling interest". Classifications based upon race, alienage or national ancestry have been declared "suspect" classifications.

COMMENT. WAITING FOR MR. JUSTICE POWELL. THE SUPREME COURT AND SEX BASED DISCRIMINATION, 5 Capital U. L. R. 227 (1976).

The Court in *Reed* v. *Reed,* 404 U.S. 71 (1971) struck down a statute that preferred men over women for appointment as administrators of estates. It applied the rational relation test, and found no rational

relation between the statute and its intended purpose. The Court again applied the rational relation test in *Kahn* v. *Shevin,* 416 U.S. 351 (1974) holding that a statute granting widows but not widowers a tax exemption was reasonable. In *Geduldig* v. *Aiello,* 417 U.S. 484 (1974) the Court again applied the rational relation test and found that the California Public Disability Fund did not violate the Equal Protection clause by withholding weekly benefits from women who had continuous disabilities as a result of normal pregnancy. For other cases applying rational relation test, see also, *Schlesinger* v. *Ballard,* 419 U.S. 498 (1975); *Taylor* v. *Louisiana,* 419 U.S. 522 (1975); *Stanton* v. *Stanton,* 421 U.S. 7 (1975); *General Electric Company* v. *Gilbert,* 429 U.S. 125 (1976). In *Craig* v. *Boren,* 429 U.S. 190 (1976) the Court stated that "Classification by gender must serve important governmental objectives, and must be substantially related to achievement of those objectives." The Court proceeded to strike down a statute that prohibited sale of 3.2 beer to males under twenty-one years of age but allowed sale to females over eighteen years of age.

It is respectfully submitted that the legal standard to be applied in Indian Civil Rights Act cases, if any, should be a "rational relation" test. The question then is whether there is any rational relation between the 1939 Santa Clara Ordinance and the cultural and traditional values of the tribe. If so, the Ordinance is a valid classification, and must be allowed to stand. The standard of equality must not be that of the Anglo Saxon society but a tribal standard of equality, and as the district court held, applied with an even hand.

Does the Santa Clara Ordinance of 1939 meet the requirements of this test? We submit that it does.

Assuming arguendo that the Act is applicable to membership questions, the pertinent facts are such that even if the courts substitute their political judgment for that of the tribe the Ordinance must stand as being culturally based and necessary to the preservation of the tribe.

It is undisputed that the Santa Clara enrollment rule was applied uniformly to all and that there has been no exception to the rule since it was codified in 1939. So long as there are no exceptions and identical rules and laws are applied to all members with either and even hand, or in a fair manner, then such action is within the safeguard intended and proper.

Petitioners strongly feel the enrollment rule of the Santa Clara Pueblo clearly meets the stricter requirements of the "rational relation" standard as the test has been construed in recent cases. The Governor of Santa Clara Pueblo, when asked the probable effect of not enforcing the 1939 Ordinance testified that:

> "It would tend to destroy the Pueblo as a whole. . . . Without it we would have an influx of people that we don't know who they are. They would come in from all directions; Indians and non-Indians alike. So it would be a destruction on the Santa Clara Indian culture. R.p. 117."

In response to a similar question, Dr. Florence Hawley Ellis, a retired Professor of Anthropology and a leading expert on New Mexico Pueblo Indians (R.pp. 227-336) testified as follows:

> "Well, because of the importance of men in connection with the carrying on of the culture, the training of the children in the socio-religious situation, *the culture eventually would break down and be lost.*" R.p. 251 (emphasis added).

It is noteworthy that the only testimony on this issue was that of the quoted witnesses, notwithstanding the fact that the Respondents had listed in the pre-trial order as an expert witness, Dr. Alfonso Ortiz, an anthropologist, Tewa Indian from San Juan Pueblo. One can only assume that he was in agreement with the testimony of the Governor of Santa Clara Pueblo and Dr. Florence Hawley Ellis and was not called as a witness for that reason.

It is without question therefore that under the rational relation test and even under the compelling interest test, the Pueblo must prevail. In both the opinion of the only expert witness and that of the Governor of the Pueblo, altering the present rule would be tantamount to destroying the very tribe the Martinez' would be members of. This surely was not intended by Congress. The Martinez have made it clear they do not desire this result. App. to Pet. p. 25(a). If survival of the Pueblo is not a "compelling" interest then the word is without meaning.

The recent Supreme Court decision in *Morton* v. *Mancari,* 417 U.S. 535 (1974), sheds additional light on the special and unique legal status of Indian tribes. The lower court in *Mancari,* a three-judge district court, ruled that the "Indian Preference Act" was repealed, and included dicta indicating the Act was unconstitutional. The Supreme Court in reversing made the following observations:

> Resolution of the instant issue turns on *the unique legal status of Indian Tribes under federal law* and upon the plenary power of Congress, based

> on a history of treaties and the assumption of a "guardian-ward" status, to legislate on behalf of federally recognized Indian tribes . . . Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for *special treatment* a constituency of tribal Indians living on or near reservations. p. 551 (emphasis added).
>
> As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process. p. 555.

Mancari acknowledges the special legal status of Indians and Indian Tribes. Had the case involved non-Indians it seems fairly clear that the Act would have been held unconstitutional, however, the preference was "reasonable and rationally designed to further Indian self-government . . ." and thus sustained.

The Fiallo Test:

The Governmental function of an Indian tribe in adopting members is analogous to the naturalization of citizens by the United States. Indeed, the Supreme Court has referred to tribal enrollment as "Indian naturalization." *Cherokee Intermarriage Cases,* 203 U.S. 78 (1906). That description is particularly apt because the absolute discretion of an Indian tribe to determine the requirements for enrollment in the tribe is as broad as that of the United States to determine the requirements for citizenship. An alien has no inherent right to naturalization and Congress may refuse or may grant naturalization upon any conditions it

may prescribe. "No alien has the slightest right to naturalization unless all statutory requirements are complied with. . . ." *United States* v. *Ginsberg,* 243 U.S. 472 (1917).

In view of the fact that this case involves tribal membership, which is analogous to citizenship in the United States, it should be decided in accordance with *Fiallo* v. *Bell,* —— U.S. ——, No. 75-6297 decided April 26, 1977. *Fiallo* involves immigration laws that provide special status to aliens who qualify as the "children" or "parents" of United States citizens or lawful permanent residents. The Act grants special preference to an illegitimate child seeking preference by virtue of its relationship with its natural mother, but no special preference by virtue of a child's relationship with its natural father. As a result, the natural father of an illegitimate child which is either a United States citizen or permanent resident alien is not entitled to preferential treatment as a "parent". An illegitimate child seeking preference by virtue of his relationship with his natural father who is a citizen or lawful permanent resident is likewise denied preferential treatment as a "child".

The Court upheld the ruling of a three-judge district court noting at the outset "the limited scope of judicial inquiry into immigration legislation". Notwithstanding the argument that the case involved "double-barreled" discrimination based on sex and illegitimacy, the Court concluded that "it is not the judicial role in cases of this sort to probe and test the justifications for the legislative decision."

Petitioners strongly urge that the proper test to be applied to Indian Civil Rights Act cases that involve

tribal membership is the test applied in *Fiallo*, "that these are policy questions entrusted exclusively to the political branches of our Government, and we have no judicial authority to substitute our political judgment for that of the Congress (tribe) . . ." Application of this test would keep intact the law concerning tribal membership as it existed prior to passage of the Act. Criteria for membership in a tribe is a policy decision that should be made exclusively by the tribe, and federal courts should not substitute their judgment for that of the tribe's.

The Court of Appeals found that the enrollment rule is strictly the result of economics. This finding is inconsistent with the facts and the findings of the district court and simply answered by showing that the group of people in the class represented by Audrey Martinez has never been asked to leave the Pueblo, notwithstanding the fact that there are over one hundred people in that category, more than ten percent of the entire population. App. to Pet. p. 14(a). Also of relevance is the fact that illegitimate children born to a Santa Clara woman are granted full rights and cared for by the Pueblo. R.p. 145.

The trial court was imminently correct in its holding that:

> the equal protection guarantee of the Indian Civil Rights Act should not be construed in a manner which would require or authorize this Court to determine which traditional values will promote cultural survival and therefore should be preserved and which of them are inimical to cultural survival and should be made by the people of Santa Clara; not only because they can best decide what values are important, but also because

> they must live with the decision every day. Obviously they can and should be the judges of whether a particular rule is beneficial or inimical to their survival as a distinct cultural group. App. to Pet. p. 26(a).

It is extremely unfortunate that the Martinez family had difficulty enrolling their children for purposes of obtaining Federal benefits; and especially saddening is the fact that one of the children allegedly died because of lack of medical attention. However, this is in no way attributable to lack of membership in Santa Clara Pueblo, not the fault of Santa Clara Pueblo's officials and certainly not pertinent to the ultimate decision of this case.

The decision in this case has a far reaching affect not only on Santa Clara Pueblo, but on all sovereign Indian tribes in the United States. This decision may very well be the difference between survival or destruction of American Indian tribes as they now exist. See *Implication of Civil Remedies Under the Indian Civil Rights Act, Michigan Law Review,* Nov. 1976. As indicated by the United States at least thirteen other Indian tribes have membership provisions based upon the father's or mother's blood line. *Memo submitted in response to the Court's Order of January 1977,* P. 9, Note 9.

The trial court after hearing evidence, observing the witnesses and being close to the facts and people involved concluded that:

> Much has been written about tribal sovereignty. If those words have any meaning at all, they must mean that a tribe can make and enforce its decisions without regard to whether an external

> authority considers those decisions wise. To abrogate tribal decisions, particularly in the delicate area of membership, for whatever 'good' reasons, is to destroy cultural identity under the guise of saving it. Congress has not indicated that they intended the Indian Civil Rights Act to be interpreted in such a manner. App. to Pet. p. 26(a).

The people of Santa Clara Pueblo have withstood the ravages of small-pox and other epidemics, and the fact that they have been surrounded by an alien culture, first Spanish and later American since, 1688. Can they survive the very Act that was intended to help guard their civil rights, or will it destroy these people under the guise of saving them?

CONCLUSION

In conclusion, it is Petitioners' position that the Tenth Circuit Court of Appeals should be reversed and the case dismissed for the following reasons:

1. Santa Clara Pueblo is immune from suits of this nature and the federal courts do not have jurisdiction.

2. If this Court should find that the lower court did have jurisdiction then the Court of Appeals should be reversed because the review of tribal membership problems should follow the law in *Fiallo* v. *Bell,* supra, and not substitute the court's judgment on this issue for that of the tribe.

3. If the Court decides that the Santa Clara Ordinance of 1939 should be tested by Fourteenth Amendment standards, then the proper legal standard is the "rational relation" standard since there is a rational relation between the Ordinance and survival of the

Santa Clara Pueblo, the Ordinance can withstand the challenge.

4. Finally, the problems of survival for Santa Clara Pueblo are such that the 1939 Ordinance meets even the strict scrutiny of the "compelling interest" test even though we submit that clearly is not the applicable test.

Respectfully submitted,

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